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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

JOEVONE ELSTER,

on Habeas Corpus.

B270217

(Los Angeles County
Super. Ct. Nos. BH010148,
A923178)

ORIGINAL PROCEEDING; petition for a writ of
habeas corpus. William C. Ryan, Judge. Petition granted.
Scott Handleman for Petitioner.

Kamala D. Harris, Attorney General, Phillip J.
Lindsay, Senior Assistant Attorney General, Julie A.
Malone, Supervising Deputy Attorney General, and Charles
Chung, Deputy Attorney General for Respondent.

Joevone Elster (Elster) was convicted by a jury in 1989 of one count of first degree murder and one count of second degree robbery, each count with an enhancement pursuant to Penal Code¹ section 12022, subdivision (a), as a principal armed with firearm. Elster was sentenced to a prison term of 32 years to life, and his conviction and sentence were affirmed by this court on May 8, 1992. He now challenges the October 15, 2014 decision of the Board of Parole Hearings (Board) finding him unsuitable for parole. After reviewing the record before us we conclude that the evidence supporting the Board's decision does not rationally support a conclusion that Elster is currently dangerous. Accordingly, we grant the petition and remand to the Board for further proceedings.

BACKGROUND

1. *The Commitment Offense*

The following facts are taken from the hearing transcript. On March 31, 1988, Elster and three companions carried out a premeditated robbery. The robbery victim was a courier who would make routine pickups from a Shell gas station. During their flight from the robbery scene, a police officer, Sergeant George Aguilar (Aguilar), chased them; one of Elster's companions shot and killed Sergeant Aguilar during the pursuit.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Elster was 22 years old at the time of the commitment offense. Before the offense, Elster worked as a cashier at the gas station. He was fired for double-billing credit cards. After his termination, Elster planned to rob the courier. Elster recruited his companions, by exaggerating the expected proceeds from the robbery, and the four engaged in four rehearsals of the robbery before carrying it out. On the day of the robbery, Elster and one of the companions rode in one car and two others in a second car. They observed the courier pick up cash at the gas station and leave the location. Using their two cars, they blocked the victim's car. The men in the second car, Van Wilson (Wilson) and Leslie Holget (Holget), left their car, robbed the courier at gunpoint, and took his car. The courier spotted Sergeant Aguilar, who he knew to be a police officer. The courier flagged down Sergeant Aguilar and the two initiated pursuit of the car containing Wilson and Holget. Elster and his vehicle companion left the scene. As the pursuit of Wilson and Holget continued, Holget fired three shots from the car he was in and struck Sergeant Aguilar, whose vehicle then crashed into a building. Other police officers rescued Sergeant Aguilar but he later died of his wounds.

Elster waited at a corner for Wilson and Holget to return, and when they did not he went back to the scene, and saw a police helicopter and cars and crime tape. Elster saw Wilson in the back of a police car and again left the scene. Elster returned to the spot where he had waited for Wilson and Holget, and Holget approached on a bicycle and

told Elster that he thought that he'd shot someone. Elster learned the details of the shooting later that night from watching the television news.

Police officers arrested Elster on April 2, 1988. He was charged with one count of first degree murder and one count of second degree robbery, each count with an enhancement pursuant to section 12022, subdivision (a), as a principal armed with firearm. A jury convicted Elster on both counts and sentenced him to 32 years to life in prison.

2. *Elster's Preprison History*

Born on August 28, 1965, Elster was the seventh of eight children. He graduated from El Camino High School in 1983, and attended Grambling State for four months. After leaving college, Elster served in the United States Navy from 1984 until 1986, but received a bad conduct discharge for dealing drugs. At the time of the life crime he was 22 years old. At the hearing, Elster admitted that at the time of the murder he was a gang member, and had been for six years. He also stated that he used alcohol and drugs when he was in college.

Elster has been married twice, and has two grown children with whom he remains in contact. His first marriage ended before the life crime. His second marriage, while he was incarcerated, was to a woman named Stephanie. Both marriages ended in divorce. At the time of his 2011 hearing, he was engaged to a woman named Crystal. After parole was denied they ended the engagement, but they remained friends and she provided a

letter supportive of Elster's release on parole. Elster's daughter is now 28 and the mother of a son and daughter; she provided a letter supportive of parole.

Elster had no juvenile record. At the time of the life crime he was on probation for a forgery charge, which was his only prior criminal conviction. This is his first prison term.

3. *In-prison Conduct*

Elster has never had a disciplinary violation in prison. The Board acknowledged this, stating "[i]t's certainly of note to the Panel and not lost on the Panel is the fact that Mr. Elster has not received a single 115 or 128 and consideration was given to that." He maintains a classification score of 19, which one of the Board members described as "as low as it can be, given the commitment offense."

The psychological evaluation relied upon by the Board, discussed below, stated that "[s]ince his incarceration began in 1989, Mr. Elster has received no CDCR-115 disciplinary actions or CDCR-128-A custodial counseling chronos. As such, he has demonstrated nothing less than stable and exemplary behavior."

Elster has not participated in gang activities since incarcerated. He is certified and works as a peer mentor for the prison's substance abuse program.

In 2013, Elster obtained an Associate of Arts degree from Lassen Community College, with a 3.75 grade point average and Presidential Honors.

4. *Parole Plans*

The Board stated its approval of Elster's "realistic parole plans," which include entering the HealthRIGHT 360 Substance Abuse residential program, which provides transitional support with therapy, vocational training, substance abuse support, and employment assistance. As a backup, he plans to enter the Options Recovery Services, a transitional housing facility. Elster's brother, Jerry, and sister-in-law, Miki, have offered Elster a place to live in their home. Jerry is a former life prisoner who was paroled in 2009, and is the founder of an organization called The Ripple Effects, which works on violence prevention. Elster also provided the Board with two letters offering him employment, as well as a letter from Project Rebound, offering support to help former prisoners attend San Francisco State University. The letter states that Project Rebound has evaluated Elster's transcripts and has determined that he will have completed the requirements for admission to San Francisco State University once he takes one college-level math course. The organization states that it has a campus wide support network for Elster that includes transportation to and from the university, food stipends, and other money for personal needs.

5. *Psychological Evaluations*

The 2015 hearing came about as a result of a petition to advance. As such, Elster was not re-evaluated prior to the 2014 hearing. The Board commented on this, stating that Elster's prior hearing took place on March 28, 2012. "You

were given a three-year denial. You did file a Petition to Advance, and that was approved on 5/12/14, and that's what brings us here today, which it's only a few months. You would have had your hearing around March of next year or before, so it's a few months early." The effect of the hearing taking place as a result of a petition to advance was that the Board relied upon a 2011 CRA conducted by Kristina Reynoso, PhD, Forensic Psychologist, BPH Forensic Assessment Division. As discussed above, Dr. Reynoso stated that Elster "has demonstrated nothing less than stable and exemplary behavior" since his incarceration. However, she also determined that Elster "has no job currently," "remains in contact with a brother who had known criminal problems and by virtue of his incarceration, he associates with other criminals." She further observed that "he has no pro-social friendships in the community at this time" and that there "are antisocial features to Mr. Elster's personality." Dr. Reynoso concluded that Elster represents a "moderate or average risk of violence. He presents with risk factors that will likely warrant periodic monitoring, specialized intervention or risk reduction strategies." This conclusion, which stems from Elster's score on a Psychopathy Checklist - Revised (PCL-R) appears to have been based almost exclusively on precommitment factors such as "grandiose components to his personality as he felt the rules did not necessarily apply to him in the past and he committed crimes for his own personal satisfaction with no regard for the feelings or well-being of others," "[h]is

lifestyle was characterized as stimulation-seeking given his engagement in gangs, drug dealing and engaging in other forms of criminal conduct for profit, as well as associating with others who led criminally-driven lifestyles,” that he “had very little interest in earning money through legal means and was easily bored by a conventional lifestyle,” that he “engaged in deceptive behaviors (infidelity; drug dealing; criminal activity; initially lying about involvement in life crime) for his benefit.” The current factors listed were that “there is an indication that he has played on the generosity of his romantic partners to some extent to receive goods he reportedly needs in prison” and that “parole plans at this point are not entirely encompassing.”

The issue of romantic partners providing financial support arose in the hearing. Elster married a woman named Stephanie, in 1993, a relationship he admits entering into for the purpose of having conjugal visits. Stephanie provided him with \$50 per month during the marriage, which lasted one year. They divorced in 1994. In 2009, Elster became engaged to his former fiancée, Crystal A. Oliver. During the period of the engagement, Oliver provided him with financial support, totaling approximately \$1,500, over a period of two years. She wrote on September 29, 2014 that “Joevone was always very loving, caring and respectful to me during our relationship. During the course of our relationship I financially supported Joevone and I never felt pressured to do so. [¶] Although we

are no longer engaged I consider him a dear friend and I wish him only the best in all his future endeavors.”

Elster retained an independent expert, Dr. Karen Franklin, to complete a psychological evaluation in 2013, before the hearing. Dr. Franklin’s report reached a conclusion that Elster presents a “very low risk to reoffend.” In addition to completing her own evaluation of Elster, Dr. Franklin provided commentary to the Board about perceived deficiencies in Dr. Reynoso’s evaluation, including that Dr. Reynoso’s CRA placed too much weight on historical and precommitment factors.

Elster also provides a copy of a 2008 evaluation prepared in connection with a prior parole hearing by CDCR Forensic Evaluator Robert E. Record, Ph.D. Dr. Record’s evaluation states that Elster scored in the “very low” range for psychopathy, the “very low” range for risk of recidivism, the “low” range for future violence based on the fact that he does not have a major mental illness or personality disorder, accepted responsibility and his role in the life crime, and has not had disciplinary violations in prison. It states that he has increased risk factors for violence and that should he utilize alcohol or drugs while on parole, it would increase his risk of violence.

6. *Parole Hearing*

Elster’s minimum eligible parole date was May 18, 2009, and since that time he has had three parole hearings. The 2014 hearing resulted in a three-year denial.

After the hearing, the Board issued its decision, concluding that factors supporting a finding of unsuitability were that Elster committed the commitment offense in a very atrocious, heinous manner; that he had a high level of culpability, as the ring leader; that “there was an unstable social history before incarceration”; that Elster “did walk away from some rather unique opportunities” pre-incarceration, including college and the military; that the motivation for the offense was not only greed but retaliation against his former employer; and that a minimal amount of money was received as a result of the robbery. The Board acknowledged that it may not rely solely on historical factors in denying parole, and stated that it “must consider whether other circumstances, coupled with the above immutable circumstances, would lead to the conclusion that [Elster does] pose a continued threat to public safety.” Applying this requirement, the Board cited Elster’s lack of “insight, and specifically, the aspect of your insight that dealt with the planning of this particular event.” The Board asserted that Elster minimized his role in the planning, and that after it was completed he “left [his] partners there and went to a location to wait to split up the loot.” They discussed his prior attempts to commit the crime and “that would have perhaps sent a signal to you that this was not meant to be.” The Board highlighted that the crime partners were lured into the enterprise by Elster with the false promise that the robbery would result in proceeds near \$50,000. The Board expressed concern about “your current level of insight into

the aspects and causative factors of the offense, that you deliberately exposed others, including your crime partners, to greater risk than you yourself chose to have.” The members also cited Dr. Reynoso’s CRA, adopting the conclusion that Elster presented a statistically moderate risk to reoffend in the free community, although they acknowledged that “this was a bit of a dated Psychological Report” due to the petition to advance.

The Board stated that some factors supported a finding of suitability, including that Elster did not have a significant history of violent crime, is at an age that reduces the probability of recidivism, and “does have realistic parole plans, going to the HealthRIGHT 360 program in San Francisco,” and that Elster “has not received a single 115 or 128” while incarcerated.

7. *Habeas Corpus Proceedings*

In May 2015, Elster filed a petition for writ of habeas corpus in the superior court. The superior court issued an order to show cause, ultimately concluding that the record contained some evidence to support the Board’s determination that Elster would present an unreasonable danger to public safety. The court found that the record did not support the Board’s conclusion that Elster lacked insight into the commitment offense, but determined that the Board, despite the flaws in the Board’s findings, would have reached the same decision absent the error.

In February 2016, Elster filed a petition for writ of habeas corpus in this court, after which we issued an order

to show cause. The Attorney General filed a return to the order to show cause, and Elster filed a traverse to the return.

DISCUSSION

Elster contends that the Board's denial of parole was arbitrary and capricious, in violation of section 3041 and its implementing regulations, and due process of law. He contends that no evidence supports the Board's conclusion that Elster is presently unsuitable for parole, and that the Board failed to articulate a rational nexus between the record evidence and the unsuitability determination.² We agree.

I. Governing Law

The Board is the administrative agency authorized to grant parole and set release dates. (§§ 3040, 5075 et seq.) The Board must grant parole and “a release date must be set ‘unless [the Board] determines that . . . *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.’” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202 (*Lawrence*).)

When assessing whether a life prisoner poses an unreasonable risk of danger to society if released from prison, the Board considers, among other factors,

² Elster also argues the Board violated due process by failing to give due consideration to the private psychologist report he provided. We disagree. The Board was not required to disregard Dr. Reynoso's evaluation and instead accept the evaluation of Dr. Franklin.

circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).)

Factors tending to indicate suitability include (1) the absence of a juvenile record, (2) a stable social history, (3) signs of remorse, (4) the motivation for the crime was significant life stress, (5) battered woman syndrome, (6) no significant history of violent crime, (7) the inmate's age, (8) realistic plans for the future, and (9) institutional behavior. (*Ibid.*) Circumstances tending to show unsuitability include (1) the commitment offense was committed "in an especially heinous, atrocious or cruel manner," (2) a previous record of violence, (3) an unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated.

(*Ibid.*) "In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety" (*Lawrence, supra*, 44 Cal.4th at p. 1205.) The "core determination" thus "involves an assessment of an inmate's *current* dangerousness."

(*Ibid.*) Unless public safety requires a lengthier period of incarceration, the presumption is that parole must be granted. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1256 (*Shaputis I.*))

A "parole release decision authorizes the Board . . . to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*Lawrence, supra*,

44 Cal.4th at pp. 1205–1206, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.)

Our review is highly deferential. If “ ‘some evidence’ ” supports the Board’s determination that the inmate currently poses an unreasonable risk to public safety, we must affirm. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 652.) Where, however, the information in a postconviction record supports a determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Board does not dispute the petitioner’s rehabilitative gains and has not “ ‘related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required “modicum of evidence” of unsuitability.’ ” (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1022–1023, quoting *Lawrence, supra*, 44 Cal.4th at p. 1227.)

II. Application of the Some Evidence Standard

Elster is currently 50 years old. He lacks any juvenile record and had no violent history or criminal convictions as an adult aside from his probation for forgery and the commitment offense. He has maintained an exemplary disciplinary record in prison for nearly three decades. The Attorney General, however, contends that the Board’s denial

of parole is supported by Elster's lack of insight, and Dr. Reynoso's CRA. We address each of these contentions.

A. Lack of Insight

The Attorney General cites the Board's finding that Elster "did not exhibit adequate insight into the causes for his actions that ultimately culminated in murder and determined that Elster downplays his role as a leader and the influence he had over his accomplices. [Citation.] The Board noted that Elster acknowledges himself as the leader, but the Board found that Elster downplayed the extent to which he lured his accomplices into committing the crime by exaggerating the amount of money they would be robbing and then exposing them and the general public to great risk of danger while keeping himself relatively safe from harm."

The Board's statements about Elster's lack of insight, however, are not supported by evidence at the hearing or before the Board. To the contrary, the hearing transcript contains multiple instances of Elster's acceptance of responsibility and lengthy discussion of his role as a leader who initiated the life crime and recruited his crime partners, as well as the causative factors. At the hearing, one of the commissioners commented during Elster's testimony that "it's become pretty clear to me from the record and also from what you've said today that you feel you were in a position of leadership in this crime."

Moreover, "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness."

(*In re Shaputis* (2011) 53 Cal.4th 192, 219 (*Shaputis II*).) Even assuming that Elster failed to show insight into the factors that caused him to commit the life crime, the decision does not provide any nexus between that fact and an assertion that Elster is currently dangerous. In *Shaputis II*, the inmate's lack of insight, after a lengthy history of domestic violence culminating in the shooting death of his second wife was demonstrated by "psychological reports . . . ; his own statements about the shooting, which failed to account for the facts at the scene or to provide any rational explanation of the killing; his inability to acknowledge or explain his daughter's charge that he had raped her; and his demonstrated failure to come to terms with his long history of domestic violence in any but the most general terms." (*Id.* at p. 216.) In evaluating whether an inmate evidences insight in the crime, the *Shaputis II* court discussed the interplay between the regulations, which do not explicitly discuss insight but instead "direct the Board to consider the inmate's 'past and present attitude toward the crime' ([Cal. Code] Regs., [tit. 15,] § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.'" (*Id.* at p. 218.) Here, the Board does not connect its asserted finding of a lack of insight with current dangerousness. "Evidence of lack of insight is indicative of a current dangerousness only if it shows a *material* deficiency in an inmate's

understanding and acceptance of responsibility for the crime. To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger.” (*In re Ryner* (2011) 196 Cal.App.4th 533, 548–549.) No such evidence is presented here.

As the court of appeal stated in *In re Hunter* (2012) 205 Cal.App.4th 1529, “[t]he Board has not articulated a rational basis supported by ‘some evidence’ to support its conclusion that Hunter will pose an unreasonable risk to public safety if paroled. There is no evidence that his mental state (including his remorse, acceptance of responsibility, or insight) indicates current dangerousness. Nothing in the record links his life crime, committed in 1984, with an assessment that he will pose an unreasonable danger if now granted parole. Nor has the Board articulated or do we see a rational nexus between the 2008 disciplinary event and a risk of future violence. In short, the record fails to provide any rational basis for finding Hunter unsuitable for parole.” (*Id.* at p. 1544.) The record here similarly fails to provide any rational basis for finding Elster unsuitable for parole based on a connection between the asserted lack of insight and a conclusion that Elster is currently dangerous.

B. Comprehensive Risk Assessment

The Attorney General also argues that Dr. Reynoso's evaluation, including the statement that Elster presents a "moderate or average risk of violence," provides sufficient evidence to support the Board's conclusion that Elster is currently dangerous. "A psychological evaluation of an inmate's risk of future violence is information that also 'bears on the prisoner's suitability for release' [citation] but such assessment does not necessarily dictate the Board's parole decision. It is the Board's job to assess current dangerousness and parole must be denied to a life prisoner 'if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.'" (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) As with the discussion of insight, above, this standard was not satisfied. The report's "moderate risk" conclusion, which stems from Elster's score on the PCL-R, was based almost exclusively on precommitment factors such as "grandiose components to his personality as he felt the rules did not necessarily apply to him in the past and he committed crimes for his own personal satisfaction with no regard for the feelings or well-being of others," "[h]is lifestyle was characterized as stimulation-seeking given his engagement in gangs, drug dealing and engaging in other forms of criminal conduct for profit, as well as associating with others who led criminally-driven lifestyles." These precommitment factors are insufficient to establish a nexus to current

dangerousness, especially in the context of his exemplary prison conduct record.

C. Youth Offender

Finally, we note that Elster was 22 years of age at the time he committed the life crime. Recent legislation provides additional instruction for a Board considering parole for an offense committed by a person who had not yet attained 23 years of age: “[w]hen a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (§ 4801, subd. (c); see *People v. Franklin* (2016) 63 Cal.4th 261, 277.) The decision does not reflect the Board’s consideration of this factor, and—particularly in light of the decision’s heavy reliance on precommitment factors and the life crime, as well as the failure to identify a nexus to current dangerousness—the decision does not provide “some evidence” supporting a finding of unsuitability.

For these reasons, although our review “‘is limited to ascertaining whether there is some evidence in the record’” to support the Board’s decision, we conclude that the record lacks some evidence—even a “‘modicum’” of evidence—to support a finding of unsuitability for parole. (*Shaputis II*,

supra, 53 Cal.4th at p. 210, quoting *In re Rosenkrantz*,
supra, 29 Cal.4th at p. 677.)

DISPOSITION

The petition for a writ of habeas corpus is granted and the decision of the Board of Parole Hearings is hereby vacated. The Board is directed to conduct a new parole suitability hearing consistent with due process of law and with this decision. (*In re Prather* (2010) 50 Cal.4th 238, 244.)

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.